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IN THE

Supreme Court of the United States

October Term, 1973
No. 72-702

GOLDEN STATE BOTTLING COMPANY, INC., formerly d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ALL AMERICAN BEVERAGES, INC., d/b/a PEPSI-COLA BOTTLING COMPANY OF SACRAMENTO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONERS' REPLY BRIEF.

MORTON B. JACKSON,
1901 Avenue of the Stars,
Los Angeles, Calif. 90067,
Attorney for Petitioner
Golden State Bottling Co., Inc.

GILFORD G. ROWLAND,
Attorney for Petitioner
All American Beverages, Inc.

Of Counsel:
JACKSON & GOODSTEIN,
ROWLAND, CLOWDUS & PARKER.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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PETITIONERS' REPLY BRIEF.

The Board's Brief[1], for the most part, deals with the impressive authority opposed to its position by expediently avoiding mention of it. To the extent that it is acknowledged at all, it is quoted out of context and its pertinence to the case at bar otherwise misread. Conspicuously absent from the Board's discussion of the

[1]In this Reply Brief, Petitioners will continue to use the terminology adopted and employed in their Opening Brief.

predecessor/successorship issues involved herein, is any discussion of its own earlier decision in *Symms Grocer*, 109 NLRB #58; 34 LRRM 1326 (1954).

In sum, the Board has failed to meet and deal squarely with these opposing authorities and the principles expounded by them. Such circuitous argument does not persuade; it only exposes the weakness of the Board's present view while, at the same time, confirming the soundness of its earlier position.

In the following pages, we will attempt, within the organizational framework of Petitioners' Opening Brief, to clarify those matters embraced within the Board's discussion which have not previously been covered in our presentation.

I.

Golden State's Liability for Reinstatement and Further Back Pay Accruals Could Not Be Continued Beyond the Sale of Its Soft Drink Business on 31 January, 1968.

For the first time in this prolonged litigation, the Board asserts that its Order does not impose any liability for reinstatement upon the predecessor employer, Golden State (Bd. Br. 35, fn. 29).[2] While the change of attitude thus manifested is perhaps a reassuring omen, it is no more, since the Board's statement is belied by the actual language of its own orders.

By the Board's original Order herein, Golden State was ordered to "offer Baker immediate and full reinstatement to his former or substantially equivalent position, and make him whole for any loss of earnings occasioned by such discrimination . . ." (App. Cert. 1-2). This

[2]Hereinafter, the Board's Brief shall be designated "Bd. Br."

aspect of the Order was enforced, without modification, by the Court of Appeals in its original decision herein.[3] By its supplemental decision, the Board reaffirmed its earlier determination as against Golden State and imposed co-equal liability upon All American. In its opinion below, the Court of Appeals enforced this Order, without modification. Neither order or court decision has since been withdrawn or modified in any respect whatever.

Even though it now concedes that the sale should have served to terminate this aspect of Golden State's remedial liability, it insists, however, upon a selective termination only, still holding the predecessor to an open-ended, continuing accrual of back pay liability past the time of sale despite its inability to perform any act which would terminate this accrual. This result is justified, says the Board, by virtue of the fact that Golden State failed, while it was still able, *but before it was finally adjudged liable to do so*, to take any steps to mitigate the effects of its wrongful conduct! (Bd. Br. 37).

This unjust reasoning flies in the face of the philosophy and the rule enunciated by this Court in *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263; 13 L. Ed. 2d 827; 85 S. Ct. 994 (1965), (hereinafter referred to as "Darlington"), in which it was held that an employer was perfectly entitled to go out of business, without liability under the Act, even though the decision to do so be motivated by anti-union animus, *i.e.*, technically an unfair labor practice. In somewhat backhanded deference to the force of this authority, the Board has attempted to distinguish the case at bar

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[3] *NLRB v. Golden State Bottling Company, Inc.*, 353 F. 2d 667 (9th Cir. 1965).

by suggesting that the rule of *Darlington* applies only to unfair practices committed *in the process of liquidation*, but not to those committed earlier (Bd. Br. 37). This distinction is wholly artificial. Nothing uttered in *Darlington* offers any support for it. On the contrary, the cases quoted by the Court with approval positively rule out such a possibility. See *New Madrid Mfg. Co.*, 215 F. 2d 908 (8th Cir., 1954), quoted in 380 U.S., at page 271.

Even so, the Board's distinction is beside the point. Petitioners do not contend that the sale of the business erases all liability for past wrongdoing. It simply terminates further accruals of continuing liability for back pay.

The Board cites *Darlington Mfg. Co. v. NLRB*, 397 F. 2d 760 (4th Cir. 1968), hereinafter referred to as "Second Darlington", which was the sequel to this Court's earlier decision discussed above. Upon remand, the Board found that the plant closing in question was motivated by a desire to discourage union activity in other plants owned by the same employer and therefore fell within the exception earlier spelled out by this Court. That is to say, the plant closure in that instance *did* constitute an unfair labor practice. To remedy this, the employer was ordered to make the employees whole for loss of back pay until such time as they were either given substantially equivalent employment in other plants of the employer, or placed on preferential hiring lists therein. This Order was enforced by a sharply divided Court of Appeals.

The case is clearly distinguishable from the case at bar and, in effect, supports the main thrust of Petitioners' contention. First, the case trips up the Board

on the very distinction it tries to draw above, since the unfair practice there was committed in the process of the plant closing which, the Board concedes, is not the situation in this case. As Petitioners have argued, however, this is a distinction without a difference.

The pertinent distinction is that in *Second Darlington,* the employer did not go completely out of the textile business, and was thus still able to offer substantially equivalent employment to the discriminatees in its other plants. In other words, it *was* able to take some act to terminate the on-going accrual of liability.

In the instant case, there has never been any suggestion of any kind that Golden State's sale of the business was in any way unlawful, irregular or motivated by anti-union animus; secondly, the sale terminated all interest and activity on its part in the soft drink business and lastly, it was thereafter wholly incapable of furnishing substantially equivalent employment to its former employees.

Similarly, in *NLRB v. Missouri Transit Co.,* 250 F. 2d 261 (8th Cir. 1957), also cited by the Board, the order compelling reinstatement of employees wrongfully discharged prior to the partial liquidation of the business, was enforced in view of the fact that the employer had liquidated *only a portion* of his business. The Court, acknowledging this, cited and quoted the identical language from *New Madrid Mfg. Co.* which was approved by this Court in *Darlington,* and then went on to add (215 F. 2d at p. 264), the following:

> "Had the Board in the instant case ordered the respondents to reinstate the shuttle-busline drivers in the interstate operation *which had been sold and over which respondents no longer had*

any control, we would consider our decision in the New Madrid case controlling." (emphasis added).

Perhaps in tacit recognition of the frailty of its position, the Board seeks to shore up its imposition of potentially infinite liability on Golden State by arguing that its agreement to indemnify All American constituted a "concession" of its liability in the premises. There are several things wrong with this.

First, and perhaps most obvious, is the fact that Golden State's very role in this lengthy litigation demonstrates that it concedes no such thing, since it has vigorously and, at considerable cost to itself, consistently disputed any such contention. Secondly, it is quite clear from the record—even those portions quoted by the Board itself (Bd. Br. 35)—that the so-called "agreement" to indemnify was nothing more than a confirmation, by Crofoot, of the warranty against pending litigation contained within the sale agreement, and an acknowledgement by him that he would honor any obligation to which a breach of that warranty might give rise.

The inference to be drawn from the circumstance is certainly not a concession of liability. If anything, Crofoot's ready disposition to stand by his contractual obligation bespeaks the depth of his conviction that *no* remedial liability in respect of Baker could be imposed against All American and that, consequently, Golden State would not be required to indemnify it for anything! Given the contentions so tenaciously and consistently asserted by these Petitioners throughout in these proceedings, this is the *only* inference which can reasonably be drawn from this circumstance.

Lastly, however, the Board continues to overlook the difference between primary and secondary liability. Even assuming that Golden State were to become liable to indemnify All American by virtue of a contractual undertaking, neither the Board nor Baker can be considered a third party beneficiary of that contract. All American's right of indemnification is not a right which can be enforced by either Baker or the Board, nor can it be made the basis for an order whose breach would result not in a civil judgment for damages, but in the sanction of contempt. Nor can such an agreement be equated with a contractual assumption of liability by the *buyer*, as was the case in *Liberty Electronics Corp.*, 143 NLRB 605; 53 LRRM 1370 (1963), cited in *Perma Vinyl*.

II.

The Board's Attempt to Impose Vicarious Liability Upon an Innocent Successor/Purchaser Employer for Unfair Labor Practices It Did Not Commit Is Without Statutory Authority and Repugnant to Principles of Due Process.

The Board attempts to brush aside the notion that §10(c) of the Act[4] represents any limitation upon the power it seeks to exercise herein. The best answer to its rather threadbare argument in this connection, is the language of the Board itself, addressed to the same problem in the identical context in *Symms Grocer* (34

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[4]"If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in a complaint has engaged or is engaging in any such unfair labor practice, then the Board . . . shall issue and cause to be served upon such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . ."

LRRM at p. 1327), which was quoted in Petitioners' Opening Brief (at pp. 33-34). Conspicuously missing from the Board's discussion is any recollection of this language or any attempt to reconcile it with the present effort to sweep aside the clear limitation imposed by that Section.

Instead, the Board avoids coming to grips with the very portions it earlier emphasized. The Board cites the words "person named in the complaint", but skirts around the heart of the Section which makes it clear that the Board's authority is limited to proceedings against persons who *have actually engaged in unfair labor practices* and that it is not empowered to impose vicarious liability, whether remedial or not, upon persons who have not engaged in or committed such acts.

The same disposition to sidestep, blur and obfuscate rather fundamental limitations which, at one time, it was most scrupulous to observe, is evidenced in the Board's present approach to the requirements imposed by Rule 65(d) of the Federal Rules of Civil Procedure,* which received such exhaustive and penetrating analysis by this Court in *Regal Knitwear v. NLRB*, 324 U.S. 9; 89 L. Ed. 661; 65 S. Ct. 478 (1945).

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*Federal Rules of Civil Procedure 65(d): *The Form and Scope of Injunction of Restraining Order.* Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

In *Symms Grocer*, the Board acknowledged the applicability of both the rule and the case to the instant situation, in the following language:

> "The Supreme Court in the Regal Knitwear case indicated that the Board's power to issue orders binding on the successors and assigns of respondents before the Board was limited by Rule 65 of the Federal Rules of Civil Procedure. In defining the classes of persons bound by orders of federal courts against parties to litigation therein, that rule does not, in our opinion, reach persons who purchase the business of a party litigant under the conditions governing Idaho's purchase of Symms' business in the instant case. We conclude, therefore, that there is no statutory warrant for that portion of the Decision and Order herein which found Idaho responsible for remedying, and directed it to remedy, the unfair labor practices of Symms."

Regal Knitwear emphasized that an order could impose liability only as against the actual parties to the proceeding or as to whom there existed an independent basis for liability whether by virtue of active concert or participation or collusion, or otherwise. Given this context, the Board has now seized on the "or otherwise" aspect of the Court's language in this respect to append an "open sesame" interpretation to the rule of *Regal Knitwear*, which would sweep any and all persons within the ambit of an Order regardless of complicity in the act originally charged, thus setting at naught the very principle which *Regal Knitwear* was at such pains to expound.

The incongruity of this assertion is, in fact, really not lost on the Board. In deference to the concept of due process including the demand that a party be afforded a hearing on the merits, the Board suggests, in all seriousness, that All American was afforded just that in the case at bar, since it was a party to the supplemental proceedings which resulted in the imposition of vicarious liability against it as a successor. This procedure is a little bit like convicting a person of crime *in absentia*, without permitting him to appear and defend on the merits, but allowing him, by way of mitigation, to participate in the penalty phase of the proceeding and argue concerning the severity of the sentence to be imposed.

To any fair-minded person, this is mockery.

Equally shocking is the fact that there is nothing in the Board's Order, or in the *Perma-Vinyl* doctrine contended for, to limit this deprivation of rights to the first successor, All American. According to this rationale, the aggrieved employee would have full recourse against yet another employer every time the business changed hands, regardless of the fact that each new successor was equally guiltless of any unfair labor practice and equally powerless to command a hearing or present evidence which might establish that fact.

Such a possibility cannot be dismissed as far fetched speculation, for in the case at bar, the business in question has once again changed hands: as of 30 March, 1973, All American was acquired by General Cinema Corporation. Presumably, the Board will shortly seek to add yet a third string to its bow.

Nowhere in this litigation is it contended that All American is or was either a party to the original

proceedings, a person in active concert or participation with Golden State in the commission of its original unfair labor practices, or a participant in any collusive scheme or plan to evade the effect of the Board's Order. It was, in fact, specifically found otherwise. Neither has it ever been suggested that the sale was anything other than a *bona fide* transaction entered into at arm's length which resulted in a genuine and total transfer of interest. Again, the genuineness and *bona fides* were specifically confirmed by the Board. In these circumstances, no order issued in the original proceedings could bind or run against All American. The Court stated in the case of *United States v. Dean Mfg. Co.*, 71 F. Supp. 96 (W.D. Mo. 1946), inexplicably cited in the Board's brief herein, as follows (71 F. Supp. at p. 97):

> "Under said Rule [Rule 65(d)] mere knowledge, in and of itself, of the issuance of an injunction would not make a person, not a party to an injunction suit, liable to contempt proceedings for committing an independent act not done in 'active concert or participation with' a party bound by the injunction."

Injunction cases cited by the Board in support of its position do little to resolve its unhappy dilemma. These cases, with the exception of *United Gilpin Corp. v. Wilmore*, 100 Colo. 453, 68 P. 2d 34 (1937), (herein referred to as *United Gilpin*) hold simply that a court may impose *in rem* restrictions against properties (as distinct from persons) passing from a seller to a purchaser, and thereby preclude the *continuing* misuse of the property in a certain manner. In fact, one of the cases cited by the Board, *United States v.*

Dean, supra, quoted above, makes it absolutely clear that such holdings would not apply to the facts in the instant case.

The Board, perhaps in recognition of the foregoing, merely footnoted these cases, reserving its emphasis for *United Gilpin*. Even so, it is interesting to note that the Board did not quote the actual language of that case (Bd. Br. 35-36), for to have done so would simply highlight its incompatibility with the consistent holdings of this Court. See, for example, the following (69 P. 2d at p. 35):

> "All members of the public are bound to observe the restrictions of an injunctive order known to be in existence, and issued by a court within its jurisdiction. Any person, though a stranger to the proceedings, who with knowledge of the existence of an injunctive writ and its terms, violates the order or assists others in so doing is by such inference defying the administration of justice and is subject to the resulting perils and penalties."

Regal Knitwear was only one of many cases diametrically opposing any such notion as that expressed by the Colorado Court. See, for example, *Chase National Bank v. Norwalk*, 291 U.S. 431, at 436-437 (1933), which states as follows:

> "It is true that persons not technically agents or employees may be specifically enjoined from knowingly aiding a defendant in performing a prohibited act if their relation is that of associate or confederate. Since such persons are legally identified with the defendant and privy to his contempt, the provision merely makes explicit as to them that which a law already implies . . . But, by extend-

ing the injunction to 'all persons to whom notice of the injunction should come', the district court assumed to make punishable as a contempt the conduct of persons who act independently and whose rights have not been adjudged according to law."

An equally eloquent statement to the same effect, by Judge Learned Hand, may be found in *Alemite Mfg. Corp. v. Staff*, 42 F. 2d 832 (2nd Cir. 1930); also see "*Developments in the Law of Injunctions*", 78 Har. L. R. 994, 1029 (1965).

Almost as if recognizing that it may have gone a bit far, the Board, for the first time in this proceeding, and in a footnote at that (Bd. Br. 27, fn. 21), suggests that the duty of reinstatement is, in any event, only conditional. All American (or Golden State, for that matter) has no obligation to "make a position" for Baker; its obligation is fulfilled merely by placing him on a preferential hiring list, if no job is presently available. This assertion is, to say the least, inconsistent with the uncompromising language of its two Orders or the decisions enforcing them without modification.

Equally unmeritorious are the policy considerations set forth in the Board's brief. At the forefront of these is the Board's assertion that only the new employer can "reinstate" the former employee to his original position, and that the imposition of a duty to do so is mitigated by the fact that the successor is likely to "need" this employee and, if he proves to be unsatisfactory, may discharge him for cause.

On the other hand, the Board does not dispute that, other things being equal, the successor is under no

obligation to hire *any* of the employees of his predecessor and that, as a consequence, no employee of the predecessor would otherwise have any right to demand employment by the successor. No reason is presented by the Board why a discriminatee should have a greater right than his fellow employees in this respect. Nor is any reason suggested why the discriminatee should not have a duty of reapplying for employment if, indeed, he does wish to be rehired.

Examination of the matter from this aspect exposes a factor which has been quite overlooked by the Board, and that is the question of whether or not the employee/discriminatee really desires reemployment. In the instant case, that is a highly debatable question. Baker, following his discharge, promptly found other employment which ultimately proved to be better paying than his former job with Golden State. At the time of the hearing, he was still permanently so employed. In December, 1968, within a matter of days following the final entry of the Court's original decision of enforcement, Baker was given an unequivocal offer of reinstatement to his old job which he promptly rejected. The Board's dogmatic assertions to the contrary notwithstanding, the real reason Baker turned this offer down was that he was not about to leave a permanent good-paying job to take the less remunerative one.*

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*The Board's assertion that Baker refused the offer of reinstatement because he realized that Schilling was purporting to represent Golden State when he no longer had any authority to act on its behalf is palpably absurd, since the letter offer was, as earlier pointed out, completely unequivocal and unambiguous and, on its face, made no reference to Golden State or All American as such but unequivocally offered reinstatement with Pepsi-Cola Bottling Company of Sacramento. Further, any claim that Baker rejected it on the ground that he was entitled to be offered a distributorship is equally unrealistic, since the Board itself did not so conclude—and so advise Baker—until several months after the offer had expired.

This fact is in no way inconsistent with Baker's position of several months later, taken at the Board's suggestion, that he was entitled to remuneration on the basis of a distributor's earnings, rather than a driver-salesman's wages.

In other words, in the case at bar, what Baker really (and quite understandably) desires is not re-employment, but the considerable windfall which the Board's unorthodox computations would insure to him.

If, indeed, an employee does wish reemployment, there is nothing to prevent his re-applying to the successor and every reason for requiring him to take at least that initiative. If the successor should refuse him because of prior union affiliation (thus attempting to perpetuate the theoretical "benefit" allegedly inuring to it by virtue of its predecessor's wrong) then it is guilty of a violation in its own right which the prescribed procedure of charge, hearing, and conviction can surely remedy in due course. If, on the other hand, the employer has no need for him, then it does indeed impose a hardship to insist that it make a place. To modify this to the extent of requiring it only to place the employee on a preferential hiring list does not answer to the employee's presumed needs and only underscores the fundamental incongruity of applying a remedy in a wholly different context from that in which the wrong arose against a party in no way culpable.

In similar fashion, the Board's assertion that the successor's refusal to comply with a Board Order is likely to have a "chilling effect" upon the employees in the future exercise of their Section 7 rights, is unrealistic. In the instant case we are dealing with an event occurring some ten years ago, and it is patent nonsense to

presume that it has any current or continuing effect whatever on a unit which has enjoyed uninterruptedly harmonious relations with its employer ever since. Since the Board, in any event, has no authority under the Act to require such compliance from an innocent successor, there should be no Order in the first instance. Without an Order, there can be no refusal to comply and, as a consequence, no chilling effect.

We suggest, as urged in our Opening Brief, that the only rule in the premises, is to require of a successor that he deal with the discriminatees of his predecessor, if any, on a basis no different from that which is required of him in dealing with any of his predecessor's other employees or other applicants for employment, for that matter.

III.

All American Cannot Be Held Liable in Any Event Due to the Failure of the Board to Prove It Had Pre-Sale Knowledge of the Unfair Labor Practices of Its Predecessor.

A prerequisite to the application of *Perma Vinyl Corp.*, 164 NLRB No. 119, 165 LRRM 1168 (1967), upon which the Board relies to impose joint liability upon Golden State and All American, is proof that All American possessed pre-sale knowledge of its predecessor's unfair labor practices. Nowhere in its Brief does the Board dispute that the burden of this proof rests solely upon its General Counsel. However, the only evidence on the issue showed that such knowledge did not exist. This evidence is as follows:

1. The testimony of Crofoot, President and owner of Golden State, and Schilling, its Secretary and General Manager of its Pepsi-Cola operation, that because

the action had been pending in the Ninth Circuit for such a long time and because, in their view, it did not present a large liability (Baker had promptly obtained equivalent employment), the matter had been simply overlooked (App. 119, 121, 127-130, 170-172);

2. The purchase agreement executed by All American contained an unequivocal warranty against any pending litigation (App. 80), which warranty, arguably, would be waived by All American had it executed the agreement with knowledge this litigation actually pended;

3. Golden State's labor attorney, Jackson, was unaware of the pending litigation (App. Cert. 7). From this, one infers that All American's auditors (and thus All American itself) were unaware of the pending litigation since they did not contact Jackson to request an evaluation of the pending claim, as is standard practice in the sale of any business;

4. The first time Schilling discussed the unfair labor practice with any All American officer was one week prior to the hearing held on February 3, 1970, when he spoke with Mr. Davis, attorney of All American in Providence, Rhode Island, and then later, on the morning of the hearing, spoke with Mr. Haley, President and Chief Executive Officer of All American, officed in Springfield, Ohio. Schilling further testified that Haley had no knowledge of the pending proceedings until that telephone conversation (App. 170-172).

With this in mind, the Board stoutly contends that it has discharged its burden, stating: "There is ample evidentiary support for the Board's finding" (Bd. Br. 11) and that "substantial evidence supports the Board's

finding" (Bd. Br. 18). But each time it makes this broad assertion, it points only to the following things:

1. That it discredited the testimony of Schilling and Crofoot;

2. That Schilling was retained by All American after the sale and *he* had pre-sale knowledge; and

3. That Petitioners failed to call officers of All American, from Providence, Rhode Island, or Springfield, Ohio, to testify on the point.

We will take up these points, *seriatim*.

The Board's discreditation of Crofoot and Schilling is based primarily upon their *post-sale* execution of certain documents tending to indicate that Golden State was still doing business as the Pepsi-Cola Bottling Company of Sacramento.[7] Based on this conduct, the Board concludes that they were attempting to conceal the fact of sale from it.

What the Board does not tell us, however, is just *why* Schilling or Crofoot would *want* to hide the fact of the sale. Certainly they were not attempting to avoid the impact of the Board's order, for promptly following the entry of the Court's final decision enforcing it, an unequivocal offer of reinstatement was made to Baker, the requisite notices were posted and the Order otherwise substantially complied with, except for the items here disputed. Furthermore, when Golden State's labor counsel first became aware of the sale, it was *he* who promptly brought that fact to the attention of the Board

[7]The Board itself committed this error before the Court below in the very brief in which it argued that the sinister motives of Crofoot and Schilling were demonstrated by their same error. The Board repeated this error in two other instances (App. 36; App. Cert. 1).

[Tr. 285-286], a fact which the Board studiously omits, for some reason, to acknowledge. With all this in mind, it is much more rational to assume that the execution of these documents in this manner occurred for the reason given, *i.e.*, because they were tendered to Schilling and Crofoot by the Board and by their own counsel and they simply followed the instructions of these presumably more knowledgeable persons.

The other "evidence" on which the discreditation is based, consists of the alleged contradictions in Schilling's and Crofoot's testimony which, as pointed out in Petitioners' Opening Brief (Br. 44) were not in fact or substance contradictory—as the Board's own excerpts themselves reveal.

But even giving the Board the benefit of every argument it raises in this context and permitting full play to all the sinister implications it tries to breathe into these perfectly straightforward circumstances, the most that is accomplished is a cancellation of their testimony on the issue of knowledge. The slate is wiped clean, and the General Counsel is back on square one, still charged with adducing evidence sufficient to carry his burden, which not even the Board disputes was his to carry.

Since mere disbelief of a witness cannot create evidence of a fact, the Board has to search elsewhere to fill this void.

It next resorts to the technical fiction of imputation, arguing that All American's post-sale retainer of Schilling may be utilized to impute pre-sale knowledge to it. This device was challenged by Petitioners in their Opening Brief. The Board has failed to produce any authority in support of its position. The cases it has cited

(Bd.Br. 20, fn. 16) are so totally inappropriate we infer these must have been cited in error.

Any application of this fiction would remove the single factor pointed to as a means by which the successor can avoid the harsh consequences of the deprivation of due process inherent in the *Perma Vinyl* doctrine. The *Perma Vinyl* doctrine as so modified would afford no reasonable opportunity for the successor to adjust the purchase price to reflect liability arising from the unfair labor practices. As applied in this instance, All American would be liable despite the fact that it did not have the "benefit" of Schilling's knowledge until *after* the sale had been completed when Schilling commenced his employment. The net effect of the application of this doctrine is to remove with the left hand concessions previously given with the right.

Lastly we come to the contention which is equally sophistical and equally bereft of common sense, namely that the General Counsel's failure to fulfill *his* burden can somehow be taxed to Petitioners and made the basis of an inference on the issue adverse to *them*. The Board suggests that because *Petitioners* failed to call officers of All American on the issue of knowledge, it must be inferred that they would have testified adversely to Petitioners on the subject.

In considering this point, it should be borne in mind, once again, that this is an issue as to which the Board had the burden.

The possible witnesses on the issue were: Schilling, Crofoot and the officers of All American who participated in the negotiations. All of these could have been called by the General Counsel. He chose, however, to call only two of them, Schilling and Crofoot. These testified positively that no knowledge existed.

To any rational mind the question immediately poses itself: Why, then did the *General Counsel* not call the officers of All American? The question almost answers itself: if he did not, it could only be for the reason that he knew or assumed that such testimony would not benefit his case; that is, that they would corroborate what Schilling and Crofoot had already testified to on the issue.

If anybody is to be taxed with a failure to call these witnesses, *it should be the party who had the burden on the issue*. For the Board, then, to attempt to tax *Petitioners* with this failure is the height of incongruity.[8]

The cases cited by the Board only underscore what we have urged above. *NLRB v. Dorn's Transportation Co.*, 405 F. 2d 706, 713 (2nd Cir. 1969), was a wrongful discharge case in which, consistent with what we have said, the inference was raised against the party having the burden. The General Counsel having presented a *prima facie* case, the burden of proof, under the authority of *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), shifted to the employer. Its failure to call the one person who could rebut the General Counsel's evidence was, quite properly made the subject of an adverse inference. In the case at bar, the burden was and remained upon the Board.

Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1938), also cited by the Board, is a similar case

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[8]The full dimension of this incongruity becomes more apparent if one but considers, for a moment, what the Board's view would have been if officers of All American *had* been called by Petitioners and *had* corroborated Schilling and Crofoot on the issue. The testimony of the latter two was contemptuously dismissed with the observation that it was a mere "self-serving denial" (Bd. Br. 18). Why then would it have treated testimony by officers of All American any differently?

in which the Court upheld an adverse inference based upon the failure to call knowlegeable persons, but only after explaining that the burden of going forward had shifted to the defendants with the introduction of certain evidence. Once again, the inference arising from the failure to call witnesses was raised against the party having the burden.

Finally, the Board relies upon *NLRB v. Wallick*, 198 F. 2d 477 (3rd Cir. 1952). In that case, an unfavorable inference was drawn against a defendant because of his failure to produce certain evidence in support of an *affirmative defense* which the defendant was charged with proving. Once again, the case emphasizes, as Petitioners have urged, that the inference can be raised only as against the party having the burden.

Nothing appearing in any case cited by the Board or, indeed, in any argument put forward by it, suggests that the Board has, in any way, been relieved of the burden imposed upon it by *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), to prove its case by a preponderance of substantial, credible evidence. Manifestly, it cannot meet this burden by seeking to impose upon Petitioners the consequences of its own failure to produce and examine all available witnesses.

On the record before us, no fair-minded person can discern any evidence whatever that All American had any pre-sale knowledge of unfair labor practices on the part of Golden State. The available evidence, indeed, points the other way.

IV.

The Board's Brief Fails to Set Forth Any Authority to Support the Remedial Aspects of Its Order.

A. All Liability Ceased to Accrue as of October 1, 1964.

The Board attempts to sidestep the consequences of its own critical finding that on October 1, 1964, Baker would have voluntarily terminated his employment relationship and commenced his own business as a distributor. He would, thus, no longer have been entitled to the pay and benefits of an employee but, would, rather (hopefully), have derived profits from his new business.

In their Opening Brief, Petitioners pointed out that, under the rule of *Mastro Plastics Corp.*, 136 NLRB No. 119, 50 LRRM 1006 (1963), their liability for reinstatement and for back pay accruals ceased to run from the time Baker would voluntarily have terminated his employment with Golden State. The Board attempts to parry the thrust of *Mastro Plastics* by discussing cases involving interim earnings derived from self-employment by discriminatees prior to reinstatement. These are beside the point. Such interim earnings, whether derived from self-employment or employment by another, would have no bearing whatever on the offending employer's basic remedial obligation, only in mitigation of back-pay liability.

Petitioners' argument was focused not upon interim earnings or the sources from which they were derived, but upon the Board's finding that even if Baker had not been the subject of unlawful discrimination by his employer, Golden State, he would, voluntarily and definitively, have *terminated his employment* with that employer to go into business for himself on 1 October,

1964. It is this voluntary termination of employment which invokes the rule of *Mastro Plastics* and terminates further accruals of remedial liability. The Board's Brief fails to respond to this argument.

B. The Board Was Without Authority to Order the Character of Remedial Action Purportedly Enjoined by It Upon Petitioners.

In their Opening Brief, Petitioners argued that the Board exceeded its power, in the remedial aspects of its Order, by purporting to require Petitioners,

(1) To "reinstate" Baker into a nonemployment situation, by establishing him in an independent business (*i.e.*, by offering to enter into a distributorship contract with him);

(2) To pay to Baker, ostensibly as "back pay," consequential damages based upon net profits which Baker allegedly would have earned in business for himself as an independent distributor.

Petitioners argued extensively in support of these contentions, and we do not intend to burden the Court by repeating those arguments here. It is, however, pertinent to note that the Board and the General Counsel have, throughout, taken the position that it is irrelevant to the issue whether the distributors were employees of Golden State or independent contractors. Petitioners have, throughout, contended that such distributors were independent contractors, and the Board's Trial Examiner so found.

The General Counsel's position on the issue is understandable, for to take a position, or to dispute the contention of Petitioners would, in effect, be to concede that the distinction did indeed make a difference.

In its Brief, the Board reveals the weakness inherent in its position and noticeably fails to adduce any convincing authority in support of its views which, be it noted, are of first impression. Rather, it resorts to misleading and inept terminology by arguing that Baker, as a distributor, "would still have been working for Golden State and its successor, All American" (Bd. Br. 39), that he would have received "earnings" as a distributor rather than profits (Bd. Br. 39) and that the monetary award ordered paid by Petitioners was "gross back *pay*" (Bd. Br. 40).

What the Board's argument adds up to, without saying so, is simply this: the distributors were really still employees of Petitioners.

In other words, the Board, once again, has avoided coming to grips with the direct thrust of Petitioners' arguments. Instead it is, in effect, arguing that the distributors were not really independent contractors after all since they continued to "work for" Petitioners and were subject to their control.

Once again, the Board has attempted to sidestep not only the heart of the issue but also the consequences of its own clear finding in this respect. We believe this tactic merely corroborates the soundness of Petitioners' position.

Conclusion.

For the foregoing reasons, together with those contained in Petitioners' Opening Brief, Petitioners request that this Court reverse the opinion and judgment of the court below and remand this matter to such court with instructions to enter judgment against Petitioner Golden State Bottling Company for back pay Baker would have earned as a driver-salesman in Golden State's employ

from the day he was wrongfully terminated through October 1, 1964. In the alternative, if this Court is not disposed to accept Petitioners' argument in regard to Baker's voluntary termination of employment, Golden State should be ordered to pay to Baker back pay he would have earned as a driver-salesman in Golden State's employ from the date of his wrongful termination until the date of sale of the bottling company by Golden State, January 31, 1968. In either instance, enforcement as against All American should be denied.

Respectfully submitted,

MORTON B. JACKSON,
Attorney for Petitioner
Golden State Bottling Co., Inc.

GILFORD G. ROWLAND,
Attorney for Petitioner
All American Beverages, Inc.

Of Counsel:
JACKSON & GOODSTEIN,
ROWLAND, CLOWDUS & PARKER.